Filed 5/17/10 A.C. v. Pomona Unified School Dist. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| A.C., a Minor, etc.,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>POMONA UNIFIED SCHOOL DISTRICT,<br><br>Defendant and Respondent. | B215607<br><br>(Los Angeles County Super. Ct. No. KC052984) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Peter J. Meeka, Judge. Reversed.

Law Offices of Michels & Watkins, Philip Michels, Shirley K. Watkins; The Ehrlich Law Firm, Jeffrey Isaac Ehrlich for Plaintiff and Appellant.

McCune & Harber, Stephen M. Harber, Barry Bookbinder for Defendant and Respondent.

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A kindergartener was sexually molested by a school employee in a secluded area of the cafeteria during a scheduled meal period. The student brought suit against the school district for negligence and for maintaining a dangerous condition of public property. The trial court granted summary judgment in favor of the school district. After conducting a de novo review, we conclude that plaintiff has presented evidence of triable issues of material fact. We reverse the judgment in favor of the school district.

## FACTS

A.C. was a kindergarten student at an elementary school in the Pomona Unified School District (PUSD). On March 27, 2008, A.C. arrived at school at 7:30 a.m. for a daily breakfast program offered before classes begin. Some 300 children are present for the morning meal. Kindergarteners eat their breakfast in the cafeteria. This is a "multi-purpose" room containing an eating area and a raised stage. The stage is accessed by stairs. For three years, the stage has been used to store boxes of books.

Two campus supervisors are supposed to survey the children during the morning meal. The supervisors are familiar with A.C. Neither of them recalled seeing A.C. walk onto the stage, by herself or accompanied by a man, on the morning of March 27, 2008.

After consuming her meal, A.C. was accosted in the cafeteria by Adolfo Ortiz, a computer technician employed at the school. Ortiz said to A.C., "Come here." They went up the stairs onto the stage, where the boxes are stored. Ortiz drew the stage curtain. He removed A.C.'s pants and underwear, had her lie down, and touched her private parts with his fingers. A medical examination showed injury to A.C.'s vagina and rectum, consistent with sexual abuse. A.C. testified that she has never been touched on her private parts, except by Ortiz on that one occasion.

Ortiz was hired by PUSD in 1998. As part of the employment application process, Ortiz submitted to a background check and fingerprinting. A "Live Scan" report from the Department of Justice did not reveal any criminal history for Ortiz. No complaints were made against Ortiz of inappropriate conduct or contact with students during his employment. The school principal declared that there were no reported incidents of molestation or sexual assault on the campus prior to March 27, 2008.

A school safety consultant opined that (1) the sexual assault on A.C. could have been avoided "with competent school staff" and (2) the stage area in the cafeteria was a dangerous condition of public property. Specifically, the staff lacked "situational awareness and formal training," which led to "ineffective supervision" of the school cafeteria. School administrators and staff "failed to understand the potential for assault that can occur within a school stage area where curtains can be drawn to hide assaults on students like that suffered by A.C. at the hands of a school employee." Because the stage is physically obscured by boxes stored there, adequate supervision of the area "is made even more difficult."

A.C., through her guardian ad litem, filed suit against PUSD. In her first amended complaint, A.C. alleges that PUSD owed a duty to provide her with a safe and secure school; a duty to adequately and properly supervise the students in the school; and a duty to act carefully in hiring school employees. A.C. further alleges that PUSD has a duty to monitor, inspect, repair, remedy and maintain the school campus to be free from dangerous conditions. The complaint asserts that PUSD did not adequately supervise A.C. while she was in the school cafeteria having breakfast. Areas of the campus were unsecured, not monitored and not inspected, thereby creating an unreasonably dangerous condition facilitating criminal acts against students. A.C. claims that PUSD did not properly hire, screen, instruct, warn, train and supervise its employees.

PUSD brought a motion for summary judgment. It argued that A.C.'s negligence claim fails, as does her claim of a dangerous condition of public property. Over A.C.'s opposition, the trial court granted the motion. In its statement of decision, the court found that PUSD cannot be held vicariously liable for a sexual assault under a theory of respondeat superior. The court also held that PUSD cannot be liable for negligent hiring, a claim that A.C. waived during the hearing on the motion for summary judgment. The court determined that A.C. did not establish a claim based on a dangerous condition of public property: "the mere fact that the stage had a curtain or boxes stacked upon it which might obstruct viewing does not render the property dangerous," the court wrote. PUSD failed to present sufficient evidence that it provided adequate supervision;

however, A.C. failed to show a causal link between her injury and PUSD's failure to provide adequate security measures. The trial court entered judgment for PUSD. A.C.'s notice of appeal was filed one week later.

## DISCUSSION

### 1. Appeal and Review

The judgment for PUSD is final and appealable. (Code Civ. Proc., § 437c, subd. (m)(1).) A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Id.*, subd. (c).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

"Summary judgment will be upheld when . . . the evidentiary submissions conclusively negate a necessary element of plaintiff's cause of action, or show that under no hypothesis is there a material issue of fact requiring the process of a trial . . . ." (*Thompson v. Sacramento City Unified School Dist.* (2003) 107 Cal.App.4th 1352, 1360.) Review of the ruling on summary judgment is de novo. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) The trial court's evidentiary rulings are reviewed for an abuse of discretion. (*Jennifer C. v. Los Angeles Unified School Dist.* (2008) 168 Cal.App.4th 1320, 1332 (*Jennifer C.*).)

### 2. Evidentiary Rulings

The trial court sustained numerous objections to the declaration of A.C.'s expert, Ronald Garrison. In reviewing the court's rulings, we bear in mind that an expert declaration submitted in opposition to a summary judgment motion "is to be liberally construed," resolving any doubts in favor of the plaintiff. (*Jennifer C., supra*, 168 Cal.App.4th at p. 1332; *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 125-126.)

Garrison is a former deputy director of education and law enforcement for the National School Safety Center. He holds two master's degrees and certifications in the area of school safety; has participated in school safety and violence prevention training

projects; teaches safety courses to special education professionals nationwide; and has professionally evaluated over 2,500 school buildings and other facilities for safety and security in 38 states. He has trained over 200 California school safety and security personnel directly engaged in the supervision of school children. To form his opinions, Garrison reviewed all of the witness depositions, declarations and relevant discovery responses, as well as the police and medical reports in this case.

The court abused its discretion in concluding that Garrison's declaration statements lacked foundation, were improper opinion or speculation, or were irrelevant. Based on his training, experience and education, Garrison could opine that the attack on A.C. was preventable with proper staff training and adequate supervision of the area; that the school staff failed to understand the potential for an assault that can occur in an area where boxes are stacked and curtains can be drawn, obscuring sight; that the hidden area should be specially supervised even in the absence of prior similar incidents of assault; and that the attack was foreseeable based on the dangerous conditions on the stage and its accessibility from the cafeteria.

**3. Negligent Supervision Claim**

School students have an "inalienable right to attend campuses which are safe, secure and peaceful." (Cal. Const. art. I, § 28, subd. (c).) Even so, a school district is not an insurer of its students' safety. (*Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Cal.3d 508, 513 (*Hoyem*).) A school "bears a legal duty to exercise reasonable care in supervising students in its charge and may be liable for injuries proximately caused by the failure to exercise such care." (*Ibid.*) "Either a total lack of supervision . . . or ineffective supervision . . . may constitute a lack of ordinary care on the part of those responsible for student supervision." (*Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741, 747 (*Dailey*); *M.W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal.App.4th 508, 518 (*Panama Buena*).)

This Court's recent opinion in *J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388 addresses a sexual molestation occurring at a family daycare home. As noted in the opinion, the duty owed by a school district is distinct because it is based "'on

the compulsory nature of education.'" (*Id.* at p. 399.) Most of the cases the trial court relied upon here are irrelevant, because they are premises liability cases not involving an elementary school. Unlike the duty owed by a landlord to tenants or invitees, there is a "special relationship" between a school and its students that heightens the duty to protect. (*Panama Buena*, *supra*, 110 Cal.App.4th at p. 517; *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1458-1459.)

The trial court found that PUSD failed to show as a matter of law that there was adequate supervision in the cafeteria on March 27, 2008. PUSD argues that it proved the existence of adequate supervision. We agree with the trial court's assessment.

In declarations submitted by PUSD, the campus supervisors state that they were "*assigned* to handle supervision duties in the school cafeteria" on the day that A.C. was molested. (Italics added.) Apart from acknowledging their assignment, neither supervisor declares that she was actually inside the cafeteria during any or all of the breakfast period, particularly at the end of the meal, when A.C. was molested. If the supervisors were absent, they would not have seen A.C. communicating with Adolfo Ortiz. The supervisors' declarations do not describe what, if anything, they did that morning to ensure student safety. Even if we assume that the supervisors were inside the building during the entire meal period, we cannot tell whether they were circulating through the cafeteria keeping an eye on the students and questioning the presence of adults who were not assigned to work there. The supervisors were apparently inattentive; were it otherwise, A.C. would not have been molested. As the trial court observed, the facts are too "sparse" to determine the adequacy of PUSD's student supervision as a matter of law on a motion for summary judgment.

Despite finding no evidence of adequate supervision on March 27, 2008, the trial court rejected A.C.'s negligence claim due to a lack of a causal link between PUSD's failure to provide adequate security measures and her injury at the hands of PUSD employee Ortiz. Under rules established by the Supreme Court, even if misconduct by a third party "was the immediate precipitating cause of the injury [this] does not compel a conclusion that negligent supervision was not the proximate cause" of the plaintiff's

damage. (*Dailey, supra,* 2 Cal.3d at p. 750.) "*Neither the mere involvement of a third party nor that party's wrongful conduct is sufficient in itself to absolve [a school] of liability, once a negligent failure to provide adequate supervision is shown.*" (*Ibid.*, italics added; *Hoyem, supra,* 22 Cal.3d at p. 521.)

At this point in the litigation, we must accept plaintiff's claim that there was inadequate supervision, absent any persuasive defense evidence to the contrary. Because there was inadequate supervision, the intervening cause of third party criminal conduct is not sufficient, in itself, to absolve PUSD of liability, under *Dailey* and *Hoyem*. "[I]t is not necessary that the exact injuries which occurred [were] foreseeable; it is enough that 'a reasonably prudent person would foresee that injuries of the same general type would be likely to occur in the absence of adequate safeguards.'" (*Dailey, supra,* 2 Cal.3d at p. 751.) "The question of actual causation [that is, whether or not more diligent supervision would have prevented the accident] is essentially a factual determination for the jury." (*Id.* at p. 750, fn. 7; *Hoyem, supra,* 22 Cal.3d at p. 520.)

Thus, if a 10-year-old boy leaves the school campus without permission before the end of classes, and is struck by a motorcycle in a public roadway, the courts "cannot say that the risk of a student's injury at the hands of a negligent motorist is, as a matter of law, not a foreseeable risk created by a school district's failure to exercise due care in supervising its pupils." (*Hoyem, supra,* 22 Cal.3d at p. 521.) Instead, the issue of causation must be submitted to a jury. (*Id.* at p. 522.) In *Dailey,* a teenaged student died after striking his head on the school's asphalt playground, where he was "slap boxing" with a friend during the lunch period. The area was supposed to be supervised. (2 Cal.3d at pp. 745-746.) The issue of causation could not be decided as a matter of law on a directed verdict in *Dailey,* because horseplay and roughhousing are activities that one might expect from unsupervised high school boys. (*Id.* at p. 751. Compare *Thompson v. Sacramento City Unified School Dist., supra,* 107 Cal.App.4th at p. 1372 [a school could not foresee the activities of drug-dealing high schoolers who "deliberately intend[ed] to escape the direct scrutiny of supervisory personnel . . ."].)

Foreseeability of harm was the primary issue presented in *Panama Buena*. A 15-year-old special needs student with the mental capacity of a third grader was sexually assaulted in a school restroom by a 14-year-old special education student who had a history of disruptive misconduct. (110 Cal.App.4th at pp. 512-514.) The court found that school districts owe unique duties to special education children, who are particularly vulnerable to sexual or physical assault. It was not necessary for the school to foresee an act of sodomy for it to be required to provide special education children with adequate supervision to prevent an assault. (*Id*. at pp. 520-521.)

In *J.H. v. Los Angeles Unified School Dist.* (2010) 183 Cal.App.4th 123, a seven-year-old girl attending an after-school program was sexually assaulted by a classmate in a secluded place on campus. Division Three of this District found that the school district owed very immature students a duty of care, even after regular school hours, and the adequacy of supervision, foreseeability and proximate cause must be left to the trier of fact. (*Id.* at pp. 144-146, 148.) The court wrote, "Although a sexual assault on a young student by a child of similar age is shocking, nevertheless playground supervisors are required to be on the lookout for the safety of their charges, including assaults on children, not just for specific forms of assault. Unlocked sheds and the back sides of classroom bungalows provide cover for assaults of any nature . . . ." (*Id.* at p. 148.)

In *Jennifer C., supra*, 168 Cal.App.4th 1320, a mentally disabled student was sexually assaulted in an alcove on school property during the lunch hour after being asked to go there by another student, whom she did not know. The alcove was visible from a public sidewalk adjoining the campus, but was not visible from the campus itself. The school's assistant principal was aware that the alcove was a potential "'problem area'" because "students could attempt to evade school supervision by hiding in the alcove," though there was no indication that students actually did so. He had directed a campus aide to regularly check the alcove during the lunch break. The area was marked by a chain to indicate that students were not allowed there, and students were informed that it was off-limits. School officials were unaware of any sexual assaults or other troublesome activity occurring in the alcove. (*Id.*, at pp. 1324-1325.)

The court in *Jennifer C.* cited the reasoning in *Panama Buena* relating to the school's need to provide adequate supervision. (168 Cal.App.4th at p. 1327.) "Given the unique vulnerability of 'special needs' students, it is foreseeable that they may be victimized by other students. Where school officials allow a hidden area to be maintained on campus, it is foreseeable that students may use the hiding place to take advantage of a 'special needs' student." (*Id.* at p. 1328.) As a result, "maintenance of a hiding place where a 'special needs' child can be victimized satisfies the foreseeability factor of the duty analysis even in the absence of prior similar occurrences." (*Id.* at p. 1329.)

On summary judgment, the defendant in *Jennifer C.* made a prima facie showing of adequate supervision: the alcove area was chained off and regularly checked by a supervisor during the lunch break. (*Id.* at p. 1330.) Nevertheless, the plaintiff overcame the school's showing. Her expert opined that supervisors should have seen Jennifer and her assailant as they walked across campus, passed the chain, went into the "no student" zone, descended stairs and entered the alcove. As a special education student, Jennifer was particularly vulnerable to sexual assault, and entitled to close supervision and monitoring by the school district, according to the expert. (*Id*. at pp. 1330-1331.) The court determined that Jennifer C. raised triable issues of fact. (*Id*. at pp. 1332-1333.)

The reasoning in *Jennifer C.* and *Panama Buena* applies to the case at bench. A five-year-old kindergartner is as vulnerable as a teenaged special needs student; therefore, kindergartners are entitled to close supervision and monitoring. PUSD attempts to draw a distinction by noting that A.C. is not "mentally retarded," unlike the students in *Jennifer C.* and *Panama Buena*. We see precious little difference between a teenager with the mentality of a five-year-old, and an ordinary five-year-old. Both are equally vulnerable and susceptible to being tricked. In *Panama Buena*, for example, the victim was a 15-year-old special needs student with the mentality of a third grader, and thus more sophisticated than a kindergartner. The decision in *J.H. v. Los Angeles Unified School Dist*., *supra*, 183 Cal.App.4th 123, underscores the duty to closely supervise secluded areas of a campus to prevent sexual assaults on young students.

In this case, a trier of fact could find that the supervisors' failure to question the presence of a stranger in the cafeteria during the children's mealtime enabled Ortiz to approach A.C., and induce her to follow him up the stairs onto the stage. One of the campus supervisors acknowledged in her deposition testimony that it is her duty to ensure that students "are safe not only from each other but from others who may be on campus." Yet the supervisors did not stop or question Ortiz, an adult who had no connection with cafeteria operations, before he accosted A.C.

In a cafeteria frequented by hundreds of small children, PUSD maintained a stage that was obscured by boxes and a curtain, and was easily accessible from the eating area by a set of stairs. A trier of fact could find that the supervisors should have closely surveyed the stairway leading to a stage. Alternatively, the stairs should have been blocked with a locked door or barrier because small children were present daily in the cafeteria and could easily be led up the stairs to an area where they would be hidden from view.[1] A trier of fact could find that the supervisors should have observed that the stage curtains were initially open, then were drawn shut, alerting them to the need to enter the stage area to see who closed the curtains. A trier of fact could find that PUSD should have directed supervisors to regularly check the box-filled stage area during mealtimes to ensure that no child had entered it. A trier of fact could find that the stage should not have been used as a storage area for stacked boxes, creating hidden areas.

In short, a trier of fact could find that PUSD's failure to adequately supervise the movements of the children in the cafeteria caused A.C.'s injury. Small, unquestioning children are a well-known target for child molesters. By allowing a child molester unfettered access to a hidden area adjacent to a room frequented by children, a sexual assault was reasonably foreseeable, even in the absence of prior similar events.

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[1] PUSD terms it "absurd" that it should have to erect a barrier. Because access to the raised stage is by a set of stairs, installing a locked door seems an easy and economical way to address the problem, not an absurd solution.

**4. Dangerous Condition of Public Property**

A public entity is liable for injury caused by a dangerous condition of its property existing at the time of injury. The injury must be proximately caused by the dangerous condition; the condition must create a reasonably foreseeable risk of the kind of injury that was incurred; and the public entity must have actual or constructive notice of the dangerous condition. (Gov. Code, § 835.) A dangerous condition is defined as "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property . . . is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, § 830, subd. (a).) "The existence of a dangerous condition is ordinarily a question of fact . . . but it can be decided as a matter of law if reasonable minds can come to only one conclusion." (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 148.)

A school may be liable for assaults occurring on its property, if the defendant maintains the property in such a way as to increase the risk of criminal activity. (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 812.) In *Jennifer C.*, the court concluded that the plaintiff had raised a triable issue of material fact as to whether the school district had maintained a dangerous condition of its property by not sealing off the alcove where the plaintiff was assaulted. Because the alcove was hidden from the view of school safety officers, a trier of fact could find that the school district's failure to erect a fence or other barrier to prevent student access created a dangerous condition. (168 Cal.App.4th at pp. 1334-1335.)

In the present appeal, a trier of fact could find that a dangerous condition was created by PUSD's failure (1) to keep the stage area clear and unobstructed by storage boxes, so that it was not hidden from the view of security staff, and (2) to restrict access to the stage area by closing off the stairs leading up the stage with a locked door or other barrier. As stated by A.C.'s safety expert, the rows of boxes on the stage "provided a perpetrator the opportunity to perform a sexual assault that was physically obscured from both the sight and supervision of other school staff who were assigned the responsibility for [A.C.'s] safety." Based on the expert's declaration, there is a triable issue as to

whether the stage portion of the cafeteria was dangerous because it was hidden from the view of school staff members.

A trier of fact could find that PUSD had actual or constructive notice of the dangerous condition of its property. The stage was used for storage for three years before A.C. was attacked; however, PUSD took no measures to limit access to the box-obscured area, though there was ample time to do so before this incident occurred. Or, PUSD could have stored the boxes elsewhere and left the stage clear, so that it could always be viewed by anyone in the cafeteria. Had it done so, this incident would not have occurred.

## DISPOSITION

The judgment is reversed. Costs on appeal are awarded to appellant.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.